SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2018 0238

DIRECTOR OF PUBLIC PROSECUTIONS Appellant

v

MICHAEL HEYFRON Respondent

JUDGES:	PRIEST, KAYE and T FORREST JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	11 June 2019
DATE OF JUDGMENT:	14 June 2019
MEDIUM NEUTRAL CITATION:	[2019] VSCA 130 Second Revision: 19 June 2019
JUDGMENT APPEALED FROM:	*DPP v Heyfron* (Unreported, County Court of Victoria, Judge Meredith, 5 October 2018)

CRIMINAL LAW – Sentencing – DPP Appeal – Four charges of armed robbery – One charge of theft of a motor vehicle – One charge of obtaining a financial advantage by deception – One charge of obtaining property by deception — One charge of being a prohibited person in possession of an imitation firearm — Guilty pleas – Respondent sentenced to four years' imprisonment with a non-parole period of two years – Whether sentences manifestly inadequate – Whether sentencing judge placed too much weight on respondent's youth, disadvantaged background and prospects of rehabilitation – Serious instance of armed robbery – Use of firearms and knives – Dangerous pursuit of victims in motor vehicle – Gratuitous violence – Strong mitigating circumstances – Dysfunctional and disadvantaged upbringing of offender – Exposure to multiple traumatic events – Diagnosis of post-traumatic stress disorder – Causal relationship to offending – Aboriginal offender – Meaningful participation in Koori Court Sentencing Conversation – Appeal allowed – Respondent re-sentenced to six years' imprisonment with non-parole period of three years.

APPEARANCES:	Counsel	Solicitors
For the Appellant:	Ms S Flynn QC	Mr J Cain, Solicitor for Public Prosecutions
For the Respondent:	Mr P Tehan QC with Mr T Brown	Theo Magazis & Associates

PRIEST JA
KAYE JA
T FORREST JA:

1 The respondent pleaded guilty in the County Court to four charges of armed robbery, one charge of theft of a motor vehicle, one charge of obtaining a financial advantage by deception, one charge of obtaining property by deception, and one charge of being a prohibited person in possession of an imitation firearm. He also pleaded guilty to a related summary charge, namely, dealing with property suspected as being the proceeds of crime. After a plea hearing in the Koori Court of the County Court, the respondent was sentenced to a total effective sentence of 4 years' imprisonment with a non-parole period of two years.[1] That sentence was constituted as follows:

2 **e**	**3** **Offence**	**4** **Maximum**	**5** **S entence**	**6** **C umulation**
7	**Indictment H13246957**			
8	9 Theft of motor vehicle *Crimes Act 1958*, s 74(1)	10 10 years 11 Level 5 imprisonment	12 6 months	13 N il
14	15 Armed robbery 16 *Crimes Act 1958*, s 75A(1)	17 25 years 18 Level 2 imprisonment	19 3 0 months	20 4 months
21	22 Armed robbery 23 *Crimes Act 1958*, s 75A(1)	24 25 years 25 Level 2 imprisonment	26 3 0 months	27 4 months
28	29 Armed robbery 30 *Crimes Act*	31 25 years 32 Level 2 imprisonment	33 3 0 months	34 4 months

[1] *DPP v Heyfron*, Unreported, County Court of Victoria, Judge Meredith, 5 October 2018 ('Reasons').

	1958, s 75A(1)			
35	36 Armed robbery 37 *Crimes Act 1958*, s 75A(1)	38 25 years 39 Level 2 imprisonment	40 3 years	41 Base
42	43 Being a prohibited person in possession of an imitation firearm 44 *Control of Weapons Act 1990*, s 5AB(2)	45 5 years 46 Level 6 imprisonment 47	48 9 months	49 Nil
50	51 Obtaining property by deception 52 *Crimes Act 1958*, s 81(1)	53 10 years 54 Level 5 imprisonment	55 1 day	56 Nil
57	58 Obtaining a financial advantage by deception 59 *Crimes Act 1958*, s 82(1)	60 10 years 61 Level 5 imprisonment 62	63 Convicted and fined $500	64 Nil
65	**Summary charge**			
66	67 Summary charge: Deal property suspected proceed of crime 68 *Crimes Act 1958*, s 195	69 2 years 70 Level 7 imprisonment 71	72 7 days	73 Nil
74	**Total effective sentence:**	75 4 years' imprisonment		
76	**Non-parole period:**	77 2 years		

78	**Pre-sentence detention**	79	315 days
80	**6AAA statement:** 5 years and 3 months' imprisonment with a non-parole period of 3 years		
81	**Other relevant orders:**		
82	– Forfeiture order on charges 1–8 pursuant to *Confiscation Act 1997*, s 32(1)		
83	– Forfeiture order pursuant to *Firearms Act 1966*, s 151		
84	– In respect of charge 1, order cancelling and disqualifying the respondent from holding licences/permits for 2 years[2]		

85 The Director of Public Prosecutions has appealed the sentence pursuant to s 287 of the *Criminal Procedure Act 2009* on the following ground:

> Ground 1 – The individual sentences, orders for cumulation, total effective sentence and non-parole period imposed are each manifestly inadequate.
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> Particulars
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> (1) In imposing the individual terms of imprisonment, in making the order with respect to cumulation and in fixing the non-parole period, the learned sentencing judge failed to have sufficient regard to:
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> (a) The applicable maximum penalty;
>
> (b) The nature and gravity of the offending;
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> (c) The respondent's prior criminal history;
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> (d) The principles of the protection of the community, general and specific deterrence, just punishment and denunciation; and
>
> (2) The learned sentencing judge placed too much weight on matters in mitigation, including the following:
>
> (e) The respondent's youth;
>
> (f) The respondent's disadvantaged background; and
>
> (g) The respondent's prospects of rehabilitation.

Circumstances of offending

86 At the time of the offending, the respondent, who was born on 11 October 1997, was 20 years of age. The offences that were the subject of charges 1 to 6 were committed

[2] Order presumed to have been made under *Sentencing Act 1991*, s 89A(1).

by him in company with Patrick McMillan ('McMillan'), who was then 33 years of age. Those offences were all committed as part of one incident on 22 November 2017. The offences, that were the subject of charge 7 and charge 8, were also committed by the respondent on the same day, 22 November 2017.

87 The incident, that gave rise to the offences charged in counts 1 to 6, commenced shortly after 1.00 am on Wednesday 22 November 2017. At the time the respondent was the front seat passenger in a stolen Commodore motor vehicle which had affixed to it stolen number plates. At the time of the offences, McMillan was driving the vehicle in Bendigo Crescent, Thomastown. The use by them of the stolen vehicle was the subject of charge 1.

88 Shortly after 1.00 am on that date, five young men, Youseef Yamanyilmaz ('Yamanyilmaz') Mustafa Sidawi ('Sidawi'), Muntahatar Al-Sharifi ('Al-Sharifi'), Kodar Hussein ('Hussein') and Hardy Al-Harbiah were travelling together in a black Toyota sedan vehicle driven by Yamanyilmaz along Main Road, Thomastown. As his vehicle passed the corner of Main Road and Edgars Road, the Commodore, driven by McMillan, and in which the respondent was a passenger, pulled out from a car park and commenced to tailgate them. As the Toyota sedan approached the intersection of Bendigo Street and Avalon Way, it slowed down. The Commodore pulled alongside it on the driver's side, and the respondent, who was in the front passenger seat, pointed an imitation handgun at the occupants of the Toyota. At the same time McMillan pointed a sawn-off single barrel shotgun also in their direction. McMillan and the respondent each demanded that the occupants get out of their vehicle. In response, the occupants of the Toyota ducked down and Yamanyilmaz accelerated away. As he did so, McMillan discharged a single gunshot from the shotgun.

89 The Commodore then pursued the Toyota through a number of residential streets at a fast rate of speed, tailgating it, and continuously attempting to pull alongside it. When the Toyota inadvertently turned into a dead end street, the Commodore followed it, and blocked off its means of escape.

90 Each of the occupants of the Toyota exited the vehicle. As they did so, the respondent and McMillan confronted them by pointing the firearms they were holding at them. They were also each holding a knife. The respondent and McMillan made demands for the occupants of the Toyota to give them money, mobile phones and wallets.

91 At that point, McMillan struck Sidawi to the side of the head with the butt of the shotgun, causing him to fall to the ground. As he did so, the respondent pointed a pistol at him and said 'Give me your phone give me your wallet'. The respondent seized Sidawi's wallet and Apple i-Phone from Sidawi's hand and walked away. The wallet contained between $150 and $250, together with various bank and identification cards. As a result of the assault, Sidawi sustained a laceration to the right side of his head, and he was later transported to the Northern Hospital by ambulance for medical treatment. The circumstances of the assault, and the theft of Sidawi's property, constituted the offence of armed robbery that was the subject of charge 2.

92 The respondent and McMillan also yelled at Al-Sharifi and demanded that he give them his money, wallet, mobile phone and 'gear'. Shortly before Al-Sharifi had got out of the Toyota, he had thrown his telephone and wallet into some bushes in order to prevent them being stolen. When he was confronted by the respondent, Al-Sharifi recognised him as a fellow classmate from his Year 11 class at school in 2010. He attempted to remind the respondent that they once went to school together. The respondent and McMillan then 'slashed' their knives together and swung their firearms in the direction of Al-Sharifi. They continued to demand that Al-Sharifi give them his wallet and mobile telephone. The respondent held a knife to Al-Sharifi's head and McMillan pointed his shotgun at him. In response, Al-Sharifi told them where he had thrown his possessions. The respondent retrieved Al-Sharifi's wallet, which contained $200 cash and various banking identification cards. After doing so, the respondent slashed Al-Sharifi across the face, and McMillan hit him with the shotgun, causing him to fall to the ground. While he was on the ground,

McMillan kicked him in the body and continued to assault him with the shotgun. As a result of the assault, Al-Sharifi suffered a one centimetre open wound on his left cheek and a two millimetre shallow wound on the right side of his face as well as bruising. Later in the day he attended Northern Hospital for medical treatment and observation. The assaults on Al-Sharifi, and the theft of his items, were the subject of charge 3.

93 McMillan then pointed the shotgun at the head of Yamanyilmaz, and demanded money from him. Yamanyilmaz said he did not have any money, but he offered his car keys to McMillan. In response, McMillan continued to assault Yamanyilmaz, striking him to the side of the head with the butt of the shotgun. As a result Yamanyilmaz fell to the ground, and as he did so, his wallet fell from his possession. It contained approximately $30 in cash and various bank and identification cards. The respondent and McMillan took the wallet and those items.

94 As a result of the assault, Yamanyilmaz sustained bruising to his head. Later, as he fled from the scene, he tripped over and fractured his left elbow. As a result, he was required to wear a sling for an extended period of time. The prosecution did not allege — nor could it — that that injury was a result of the physical assault committed by McMillan in the course of the robbery (although it was clearly sustained as Yamanyilmaz fled from this terrifying episode). The circumstances of the assault, and the theft of Yamanyilmaz's property, constituted charge 4.

95 After the assault on Yamanyilmaz, the respondent then assaulted Hussein by stabbing his left arm multiple times with his knife. As a result, Hussein fell to the ground. While he was there, the respondent further assaulted him, and stabbed him in the leg and stomach. At the same time, McMillan struck him a number of blows over the head with the butt of the shotgun. As a consequence of that assault, he sustained multiple stab wounds to his body and was required to be transported by ambulance to the Northern Hospital for medical treatment. There he underwent surgery to repair the injuries that he sustained to his left arm and leg. At the time of the sentence, it was not known whether he would need to undergo further surgery,

or whether he would regain the full use of his hand. The assault, and theft from Hussein, was the subject of charge 5.

96 Throughout the offending that constituted charges 2 to 5, the respondent was armed with an imitation handgun. His possession of that weapon was the subject of charge 6.

97 After all the occupants of the Toyota had fled, McMillan and the respondent searched the vehicle, and stole further items that were in it.

98 The respondent committed the offences, that were the subject of charges 7 and 8, later on the same day. At 7.22 am on that day, the respondent used the bank card, that had been stolen from Yamanyilmaz, to pay a taxi fare of $9.35 (charge 8). Subsequently at 10.42 pm, the respondent used the bank card, belonging to Al-Sharifi, to purchase $75.48 worth of goods at a Coles express service station in Kealba (charge 7).

99 The respondent was arrested two days later on 22 November 2017 in Mulgrave. He was found to be in possession of multiple bank cards that belonged to the victims. He was also in possession of other items. His possession of those items constituted the related summary offence of dealing with property suspected of being the proceeds of crime.

100 When interviewed by police, the respondent made a partial 'no comment' record of interview. However, he did admit to being a passenger in the Commodore vehicle and being present throughout the armed robberies. He also admitted possession of stolen identification and bank cards, but he denied being in possession of the imitation firearm. He said that only one firearm was used during the offending. The respondent also admitted to purchasing cigarettes and drinks by using one of the victim's stolen bankcards at the Coles express service station.

The respondent's previous convictions

101 At the time of the offending, the respondent had a substantial criminal history. He was first before the Melbourne Children's Court in December 2012 on a number of offences, including burglary, theft of a motor vehicle, theft and traffic offences. He was placed on probation, without conviction, for a period of nine months. During the ensuing five years, he came before the courts on a number of occasions on charges of burglary, theft of a motor vehicle, theft, and driving offences. Most recently, in May 2017, he came before the Melbourne Magistrates' Court on a number of charges which included theft, intentionally damaging property, reckless conduct endangering serious injury, and traffic offences. He was sentenced to an aggregate period of 75 days' imprisonment, and placed on a community correction order for a period of two years. That order was still current at the time of the offending in this case.

The plea

102 The respondent is of Koori heritage. His mother, who is from Tasmania, was a member of the Stolen Generation. He grew up in the northern suburbs of Melbourne. From an early stage in his life, and during his childhood, he was exposed to domestic violence that was perpetrated against his mother by one of his mother's partners. At times in order to escape the violence, he resided with his grandparents. The respondent's relationship with his mother had its difficulties, as she drank excessively and she was subject to unpredictable and volatile mood swings.

103 During that period, the respondent attended six different primary schools. While he was in Year 6, he suffered a badly broken leg in a motor vehicle accident, and he spent much of that year in a wheelchair and then on crutches. He completed his education at Year 7 level. Apart from working as a concreter's labourer at the age of 14 years, and briefly as a carpenter's assistant in 2017, the respondent was unemployed in the ensuing years.

104 During the respondent's adolescence and teenage years, he was exposed to a litany

of traumatic events. From an early stage, he gravitated to the company of older persons who plainly were an adverse influence on his life. When he was 14 years of age, he was an eyewitness to the apparent murder of a close friend who was shot in the head. During the years that followed, he sustained injuries in a number of physical confrontations and accidents, which, apparently, included being struck on the head with an iron bar, and being stabbed in the left hand. In January 2018, while he was on remand at Barwon Prison in respect of the present matters, he was assaulted by a fellow prisoner, and suffered a broken eye socket and concussion as a result.

105 In addition, during that time, the respondent's personal life continued to be afflicted with emotional trauma. At a young age, he formed a relationship with a young woman, and the couple have a two year old boy who lives in Preston in the care of his mother. In 2017, they lost an unborn child. In June 2018, while the respondent was on remand, his partner suffered another miscarriage at eight months' gestation.

106 From an early point in his adolescence, the respondent had resorted to poly-substance abuse. Since then he had abused alcohol, cannabis, amphetamine, cocaine, MDMA, LSD, GHB, buprenorphine, benzodiazepines and methylamphetamine. His use of methylamphetamine peaked in 2017, when he would smoke 1.7 grams of the drug per day, often in combination with GHB and benzodiazepines.

107 During the plea sentencing conversation in the Koori Court, the respondent's half-sister described the respondent's upbringing in the following terms:

> He never had a father at all. Every influence he did have was a domestic violent partner with my mum. She was an alcoholic the whole time we were growing up. So we barely had a mum. All he had was seeing me and my older brother in and out of jail on drugs. He didn't have anyone doing normal things to see — to encourage him to do it.

108 On the plea, counsel for the respondent tendered a report from a psychologist, Mr Ian Mackinnon, who examined the respondent in July 2018 at the Metropolitan Remand Centre. Mr Mackinnon diagnosed the respondent to suffer from post-traumatic stress disorder resulting from a number of incidents in his life, including

his exposure to domestic violence at a young age, the serious motor vehicle accident in which he was involved when he was 11 years of age, his developmental exposure to substance abuse, his confinement in youth training centres during his adolescence, his being a witness to the fatal shooting of his close friend, and the loss of two unborn babies to his current partner. In that respect, Mr Mackinnon noted that much of the respondent's life had been marked by personal traumas and chaos and that he presented 'as a chronically distressed individual who is ill-equipped for employment and the usual social obligations and demands of adulthood'.

109 Mr Mackinnon further considered that there was a relevant connection between the disorder and the respondent's offending, stating:

> In my opinion, Mr Heyfron's PTSD probably made a significant contribution to his offending by degrading his ability to reason and make sound judgment, elevating his impulsivity, lowering his powers of consequential thinking, lowering his frustration intolerance threshold and encouraging a self-destructive and self-absorbed perspective that lacked empathy and concern for other individuals or the wider community.

110 Mr Mackinnon also noted that the respondent expressed remorse for his offending, and that he had a strong determination to rehabilitate himself. Mr Mackinnon considered that the respondent's prospects for rehabilitation would be enhanced by an order for parole or a community correction order that provided him with the appropriate level of supervision and treatment that he required. He also considered that if the respondent was incarcerated for a further period of time, he would remain at risk of further violent assault and threats, and he would be unlikely to be able to address his post-traumatic stress disorder.

111 In the course of the plea, counsel tendered a number of certificates relating to a substantial number of courses that had been undertaken by the respondent while on remand. Relevantly, they included a certificate by the project manager of the Beyond Survival Program (an Aboriginal men's cultural healing program) certifying that the respondent had completed three days of that program which focused on culture, identity and healing. He had also undertaken the Men's Behaviour Program conducted by the Victorian Aboriginal Child Care Agency ('VACCA') and the Men's

Healing and Behaviour Change Program provided by Dardi Munwurro.

112 Based on those matters, while conceding that the offending was very serious, counsel for the respondent, on the plea, submitted that the traumatic circumstances to which the respondent had been subjected reduced his moral culpability for the offending. Counsel also relied on the early plea of guilty made by the respondent, his relevant admissions, his youth, and the fact that he had not previously served a lengthy period in adult custody. It was also put that the respondent had good prospects of rehabilitation, and, based on the matters contained in Mr Mackinnon's report, a further period of incarceration would be burdensome on him by reason of his vulnerability to assaults while in adult prison.

Reasons for sentence

113 In his reasons for sentence, the judge noted that as a result of his disadvantaged and dysfunctional background, the respondent was ill-equipped to function appropriately in society, and that as a consequence his moral culpability was reduced. The judge also accepted that the respondent's period in custody was more burdensome because of his post-traumatic stress disorder. He considered that the respondent had participated in a meaningful way in the sentencing conversation in the Koori division, which was a factor that he was entitled to have taken into account on his behalf. The respondent had pleaded guilty at an early stage, he was now 'appropriately remorseful' for his offending, and his plea had facilitated the course of justice. The judge further accepted that the respondent was motivated to change his life and that he appeared to be 'waking up' to himself.[3]

114 The judge stated that while he could only be 'cautiously optimistic' concerning the respondent's prospects of rehabilitation, nevertheless he considered that he should maximise those prospects by providing a potential period of parole that was longer than otherwise might have been the case.

[3] Reasons [31]–[36].

115 In conclusion, the judge acknowledged the aggravating circumstances in the case, including the violent and vicious nature of the commission of the armed robberies, and the gratuitous resort to violence by the respondent and his co-offender.[4] His Honour, however, also considered that the respondent's young age was a 'highly relevant sentencing consideration'.[5]

Submissions

116 Senior counsel for the Director commenced her submissions by noting that the offence of armed robbery is, of itself, a serious criminal offence, which is demonstrated by the prescribed maximum sentence of 25 years' imprisonment. She submitted that the offending, in charges 2 to 5, were serious instances of that offence. The respondent committed the offences in company. He and McMillan were well prepared to commit the offences, travelling in a stolen vehicle, and being armed respectively with an imitation firearm, a loaded sawn-off shotgun and knives. Counsel noted that when the pursuit of the victims first commenced, the respondent pointed the imitation firearm, and the loaded sawn-off shotgun was pointed by McMillan, in the direction of the victims, while demands were made by both McMillan and the respondent for the victims to get out of the vehicle.

117 Counsel also pointed to the discharge of the firearm by McMillan, and to the fact that both McMillan and the respondent wielded knives at the victims, in addition to their firearms, after they had cornered the victims in a dead end street. Each of the victims were gratuitously assaulted by the respondent and McMillan with their weapons, notwithstanding that the victims were complying with the demands made of them.

118 Further, counsel noted that each of the four victims of the offences, that were the subject of charges 2 to 5, suffered injuries as a result of the assaults that were perpetrated on them in the course of the armed robbery, and that each of them was

4 Ibid [40].

5 Ibid [41].

required to attend hospital for treatment in respect of those injuries.

119 In those circumstances, it was submitted that the sentences, imposed in respect of charges 2 to 5 did not properly reflect the seriousness of the offending, or the importance of the role of general deterrence and specific deterrence in respect of sentencing for such offences.

120 Counsel for the Director further contended that the sentence imposed on charge 1 (theft) was 'extremely low' in light of the importance of the principles of general and specific deterrence in respect of that offending. The respondent had previously been found guilty of seventeen charges of stealing a motor vehicle, and an additional eighteen charges of theft. In those circumstances, it was submitted, a sentence of 6 months' imprisonment, with no order for cumulation, effectively left the offending, that was the subject of charge 1, unpunished. It was similarly contended that although the value of the property or financial advantage involved in the offending that was the subject of charges 7 and 8 was quite low, nevertheless that offending involved two different victims, and accordingly, it was submitted, the sentences imposed on the respondent failed to adequately serve the purpose of specific deterrence.

121 Counsel for the Director further submitted that a significant feature of all the offending was that the respondent committed the offences while subject to a community correction order, which had been imposed on him just over six months before the offending in the present case. It was submitted that the judge failed to take into account that matter as an aggravating feature of the respondent's offending.

122 Counsel for the Director acknowledged that there were a number of mitigating circumstances, including the respondent's difficult experience in prison, the fact that he suffered from post-traumatic stress disorder, his plea of guilty, and his meaningful participation in the Koori Court Division Sentencing Conversation. Counsel accepted that the respondent's youth, and his disadvantaged background,

reduced the respondent's moral culpability. Nevertheless, it was submitted, the respondent's moral culpability for the offending remained high. The fact that those circumstances had not equipped the respondent for an adult life, raised the question whether protection of the community should have been given greater weight.

123 For those reasons, it was submitted that the sentences imposed on the respondent were manifestly inadequate.

124 In response, counsel for the respondent noted that in addition to the respondent's youth and disadvantaged background, there were other mitigating factors, including the fact that the respondent suffered from post-traumatic stress disorder, that he had been assaulted in prison, that he had pleaded guilty indicating appropriate remorse, that his previous criminal history contained no offences of personal violence, and that he had participated meaningfully in the Koori Court Sentencing Conversation. Counsel for the respondent contended that the appellant's submissions focused almost entirely on considerations of general and specific deterrence, denunciation, just punishment and protection of the community, to the effective exclusion of all other sentencing functions. Counsel submitted that the judge was clearly aware of, and indeed stressed, the serious nature of the offending engaged in by the respondent. However, on the other hand, there were substantial mitigating factors relating to the offending and to the circumstances of the respondent.

125 In particular, it was contended that the moral culpability of the respondent was significantly reduced as a consequence of the disadvantage and dysfunction that he had suffered during his upbringing. The respondent was sentenced as a young Aboriginal man who had suffered from multiple traumas and difficulties, faulty role models, and distressing childhood events. Counsel contended that the submissions advanced on behalf of the respondent failed to give any adequate weight to that consideration. Nor did they take into account, properly, the weight to be attributed to the respondent's meaningful participation in the Koori Court Sentencing Conversation. Counsel noted that it is recognised that active participation in the Koori Court process may be more burdensome than involvement by an offender in a

traditional plea hearing, which, in this case, was evidenced by the fact that the respondent became physically ill in the course of being confronted by members of the Bench during the hearing. In the present case, it was also noted that the respondent's mother and sister had participated in the process of the Koori Court, which made the process more meaningful, and more poignant for the respondent.

126 Counsel also noted that as a mitigating circumstance, by the time of the plea hearing, the respondent had made considerable steps towards being rehabilitated while incarcerated on remand. As additional mitigating factors, counsel pointed to the youth of the respondent, and to the fact that, in light of the respondent's post-traumatic stress disorder, his experience of imprisonment would be more burdensome, and incarceration would be likely to exacerbate his disorder.

127 Counsel for the respondent further contended that the orders made by the judge, for a substantial concurrency, were appropriate, given that a number of the offences were part of a series or course of conduct engaged in by the respondent and his co-offender. In that context, it was contended, the principle of totality required some moderation of the sentence in order that the respondent not be subjected to a crushing sentence which was disproportionate to his offending and his prospects.

128 Finally, counsel submitted that if the Court were to conclude that the sentences imposed on the respondent were manifestly inadequate, the Court ought not, in the exercise of the residual discretion, impose a more substantial sentence on the respondent. In particular, it was contended, there was a very real risk that any increase in sentence could adversely affect the respondent's mental health, and undermine his prospects for successful reintegration into the community at the conclusion of his sentence. In that respect, counsel also relied on certificates, that were tendered to the Court, evidencing the completion by the respondent of further courses while in custody. It was submitted that the respondent has embarked on a genuine process of rehabilitation, and that it is not in the community's interest that that process be jeopardised by an increase in the sentence that he is to serve.

Analysis

129 The principles, which apply to the ground of appeal relied on by the Director in this case, are well established. They were conveniently summarised by this Court in *Director of Public Prosecutions v Karazisis*[6] in the following terms:

> In Victoria, the contention that a sentence was manifestly inadequate is invariably expressed as a submission that the sentence was outside the range reasonably open to the sentencing judge in the circumstances. As with the ground of manifest excess, the ground of manifest inadequacy is a stringent one, difficult to make good. Error of this kind will not be established unless the appellate court is persuaded that the sentence was 'wholly outside the range of sentencing options available' to the sentencing judge. Put another way, it must be shown that it was not reasonably open to the sentencing judge to come to the sentencing conclusion which he/she did if proper weight had been given to all the relevant circumstances of the offending and of the offender.
>
> The court will be astute to enforce the stringency of this test. As the High Court has emphasised:
>
> > The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.[7]

130 Those principles are pertinent in the determination of the present appeal. It is not suggested, by the Director, that the sentencing judge failed to appreciate, or take into account, the seriousness of the offending engaged in by the respondent, or that he incorrectly took into account irrelevant factors as mitigating circumstances in the respondent's favour. In essence, the fundamental proposition that underlies the appeal in this case is that, by virtue of the length of the sentences imposed on the respondent, the mitigating circumstances, taken into account by the judge, must have 'overwhelmed the sentencing discretion'.

131 Of itself, the offence of armed robbery is particularly serious, as reflected by the maximum prescribed sentence of 25 years' imprisonment. In this case, there were a number of aggravating features of the offending. They included the pointing by the respondent of the imitation firearm, at the victims, the use by the co-offender of a loaded shotgun, the discharge by him of that weapon in the direction of the victims,

6 (2010) 31 VR 634.

7 Ibid 662–3 [127]–[128] (citations omitted).

the brazen and dangerous pursuit by the co-offender and the respondent of the victims in their motor vehicles, the wielding by the respondent and the co-offender of knives, the gratuitous violence directed by the respondent and his co-offender to each victim of the armed robberies that were the subject of charges 2 to 5, and the injuries sustained by the victims. Each of those factors were expressly recognised by the judge in his sentencing reasons.[8] They were each circumstances that informed a proper assessment of the objective gravity of the offending.

132 In the present case, the respondent fell to be sentenced, for those offences, and for the other offences that were charged, as a person who had previously come before the courts on a number of occasions for sentence. It is relevant that, as noted by counsel for the Director, a number of the previous convictions were for offences of dishonesty and the like. The respondent had been afforded a number of opportunities for rehabilitation, but he had failed to avail himself sufficiently of them. At the time of the present offending, he was serving a community correction order. All of those matters were relevant to the determination of the sentence in this case. Of course, it needed to be borne in mind that the respondent did not have any previous convictions for violence, or any offending of the kind that he had engaged in this case. Indeed, the offending, in this case, constituted a quite dramatic step-up in the kind of offending that the respondent had been involved in in the previous years.

133 In that context, it is noted that the co-offender, McMillan, was significantly older than the respondent. It was McMillan who drove the vehicle, and who had possession of the loaded shotgun. While the respondent readily participated in the offending — including in the violence inflicted on each of the victims of the armed robberies — it is clear that he could not be described as being the leader of the escapade. Nevertheless, there was no evidence that he was other than an equal participant in it with McMillan.

134 Notwithstanding those considerations, the objective gravity of the respondent's

[8] Reasons [40].

offending in this case remained high. As senior counsel for the respondent realistically accepted, the offending, that was the subject of charges 2 to 5, was very serious. The conduct of the respondent, and his co-offender, was entirely outrageous. It contravened the basic norms of ordinary civilised behaviour. It is particularly concerning that the respondent, and his co-offender, lay in wait, in their stolen vehicle, with weapons, seeking out an appropriate target to rob. To that extent, the offending involved a degree of planning and premeditation. In the absence of strong mitigating circumstances, the offences, that were the subject of charges 2 to 5, would ordinarily call for sentences of terms of imprisonment totalling at least twice the total effective sentence imposed on the respondent in this case.

135 However, the determination of the appropriate sentence in this case did not, and does not, of course, depend solely on an assessment of the objective gravity of the offending. In addition, a number of other matters are relevant, including those factors that properly inform a considered assessment of the subjective culpability of the respondent for his offending.

136 It is in this context that the respondent's background is of particular significance. The respondent was raised and grew up in significantly dysfunctional and traumatic circumstances. From an early age, he was a witness to acts of domestic violence perpetrated against his mother by her abusive partners. In describing one such incident to Mr Macmillan, the respondent stated:

> It was my sister's birthday. My mum and aunty attacked him but he bashed them both. Then he smashed his car and broke his back. Then mum's next boyfriend bashed her too. She'd pick her boyfriends over us. One of them pushed my brother Jackson onto a glass coffee table.

137 During that time, the respondent had an ambivalent relationship with his mother as she drank heavily and her moods were volatile and unpredictable. At times in order to escape the domestic violence, the respondent was required to reside with his grandparents.

138 The respondent's exposure to trauma did not subside after he had passed into

adolescence. As already stated, he spent much of Grade 6 in a wheelchair and on crutches after breaking a leg in a motor vehicle accident. As a result he missed a lot of school and fell behind. During his years at primary education, he attended six different schools. After leaving school, he was closely connected with other traumatic events. As noted, he was a witness to a close friend being fatally shot. He was also involved in other physical confrontations as a result of which he sustained a number of injuries. In 2017 his partner suffered a miscarriage. Mr Mackinnon concluded that it was those circumstances that resulted in the development by the respondent of a post-traumatic stress disorder, which Mr Mackinnon considered made a significant contribution to his offending in the present case in the manner described in the extract from his report referred to earlier.

139 The relationship between the respondent's traumatic and dysfunctional upbringing, his post-traumatic stress disorder, and his offending in the present case, is centrally relevant to a proper assessment of the respondent's subjective culpability for the offending in the present case. In *Bugmy v The Queen*,[9] the High Court described the manner in which those factors are relevant to an assessment of an offender's moral culpability in the following terms:

> The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.
>
> …
>
> The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
>
> Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving 'full weight' to an offender's deprived background in every sentencing decision. However, this is not to suggest … that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to

[9] (2013) 249 CLR 571.

> extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.[10]

140 Those principles are particularly relevant to the present case. The offending was not committed by a person who had had the advantage of a stable upbringing and whose values had been shaped by appropriate parenting. If the same offences had been committed by an individual from such a background, the moral culpability of that individual would have been significantly greater than that of the respondent. The respondent's values, and his responses, were necessarily shaped by the trauma and dysfunction to which he had been subjected in the course of his formative years. While those matters do not, of course, excuse the respondent's offending, they were, properly, taken into account by the sentencing judge in the assessment of the respondent's moral culpability.

141 The respondent's offending occurred in the context of a long standing history of polysubstance abuse by him. Ordinarily, intoxication is not a mitigating factor. Indeed, in some circumstances, it may aggravate an offender's culpability. However, where the abuse of drugs has its genesis in the kind of dysfunction to which the respondent was subjected in his early years, it may be taken into account as a relevant mitigating factor. In *R v Fernando*,[11] Wood J stated:

> While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the Court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.[12]

142 Those principles, with appropriate adaptation, may be applied to the present case. While the respondent is of Aboriginal heritage, it does not seem that he grew up in

10 Ibid 594–5 [40], [43]–[44].

11 (1992) 76 A Crim R 58.

12 Ibid 62–3.

an Aboriginal community. Nevertheless, as discussed, his upbringing had a number of the features referred to by Wood J. [13]

143 Allied to those considerations is the principle that the moral culpability of an offender may be reduced where it is demonstrated that a psychological disorder or psychiatric illness, suffered by the offender, was causally connected with the commission of the offence. In *R v Verdins*,[14] the Court of Appeal described how impaired mental functioning may have that effect on an assessment of an offender's moral culpability in the following terms:

> Impaired mental functioning at the time of the offending may reduce the offender's moral culpability if it had the effect of:
>
> (a) impairing the offender's ability to exercise appropriate judgment;
>
> (b) impairing the offender's ability to make calm and rational choices, or to think clearly;
>
> (c) making the offender disinhibited;
>
> (d) impairing the offender's ability to appreciate the wrongfulness of the conduct;
>
> (e) obscuring the intent to commit the offence; or
>
> (f) contributing (causally) to the commission of the offence.
>
> As we have said, this is not to be taken as an exhaustive list.[15]

144 It is evident, from Mr Mackinnon's report, that the respondent's post-traumatic stress disorder had each of the effects described in sub-paragraphs (a), (b) and (c) in that passage from the decision in *Verdins*. In particular, the respondent's disorder impaired his capacity to reason and make a sound judgment. It also elevated his impulsivity and lowered his powers of consequential thinking.

145 In that way, the respondent's background, and his disorder, are, and were, of particular relevance in assessing his moral culpability for the offending he engaged in in this case. Certainly, the respondent was aware of what he was doing, and he

13 See also *R v Fuller-Cust* (2002) 6 VR 496, 520 [78]–[80] (Eames JA).

14 (2007) 16 VR 269 ('*Verdins*').

15 Ibid 275 [26].

had the capacity to appreciate the wrongfulness of his conduct. However, the respondent's disorder, and his dysfunctional upbringing, are necessarily relevant to an assessment of his culpability. Through no fault of his own, he grew up in traumatic circumstances in which the ordinary norms of human behaviour were absent. He was subjected to a series of traumatic events that resulted in the disorder that was operative at the time of the offending. Accordingly, in our view, the judge's assessment, that the respondent's moral culpability was diminished by virtue of those factors, was appropriate and relevant to the determination of the sentences in the present case.

146 In addition, there were a number of other factors which, senior counsel for the Director has recognised, were relevant mitigating factors in favour of the respondent. In particular, at the time of the offending, and at the time of sentence, the respondent was young. His youth was, and is, an important mitigating factor. The law has long recognised the importance of the rehabilitation of young offenders in the interests of the community as a whole.[16] In cases such as the present — involving the infliction of gratuitous violence — the weight of an offender's youth as a mitigating circumstance is diminished. Nevertheless, for the reasons discussed, it is a relevant and important operative factor.[17] In that context, it is relevant that, while he was on remand, the respondent had undertaken and completed a number of courses which were directed to his rehabilitation. While the judge was 'cautiously optimistic' concerning the respondent's prospects of rehabilitation,[18] his Honour was correct to consider that they were of importance notwithstanding the objective gravity of the offending.

147 The respondent pleaded guilty at an early stage, indicating appropriate remorse for the offending and a desire to facilitate the course of justice. He expressed appropriate remorse when interviewed by Mr Mackinnon, and in the sentencing conversation in the course of the plea, in terms that indicated a degree of

16 *R v Mills* [1998] 4 VR 235.

17 *DPP v Lawrence* (2004) 10 VR 125, 132 (Batt JA); *Azzopardi v The Queen* (2011) 35 VR 43, 57 [44].

18 Reasons [38].

understanding of and empathy for the plight of the victims of the armed robberies.

148 Further, the respondent is youthful in appearance, and quite vulnerable in prison. At the time of sentencing, he had already suffered a severe assault at the hands of a fellow prisoner. Mr Mackinnon noted that, as a consequence of that assault, and his chronic post-traumatic stress disorder, the respondent was fearful and anxious for his welfare within prison. He considered that as a result, the respondent was unlikely to make any progress in addressing his disorder during the term of his sentence. As a consequence, the sentence of imprisonment would weigh more heavily on him. In addition, while he had been in custody, the respondent's partner had suffered a second miscarriage at a very late stage of pregnancy, which only served to exacerbate the burdensome nature of the respondent's incarceration.

149 Finally, as the sentencing judge correctly took into account, the respondent participated in a meaningful way in the sentencing conversation that took place in the Koori Court division of the Court during the sentencing hearing.[19] He acknowledged the detrimental influence that his use of drugs had had on his life. Twice, during the conversation, the respondent expressed remorse for what he had done, commenting that his victims 'didn't deserve it' and that they would be 'scarred for life for what I've done'. In that respect, he likened the trauma, to which he had subjected the victims, to the trauma he had suffered when he had seen his friend fatally shot in front of him. It is clear that the respondent was fully and emotionally invested in the Sentencing Conversation. At one point, while his mother was talking about him, the respondent became physically ill, apparently as a result of being overwhelmed by emotion.

150 In *R v Morgan*,[20] the Court of Appeal recognised that, in an appropriate case, meaningful engagement in the Koori Court Sentencing Conversation may operate as a mitigating circumstance. In particular, the fact that the respondent appeared to face the 'shaming' that is an integral part of those proceedings, and as such he was

19 Reasons [33].

20 (2010) 24 VR 230.

prepared to be accountable for his offending, was a relevant factor. It is acknowledged that participation in the process of a Koori Court is more burdensome than appearing at a traditional plea hearing. That is particularly so where, as in the present case, the respondent has sought to reconcile with his Indigenous heritage and to connect with the enduring mores and values embedded in it.[21]

151 In *Honeysett v The Queen*,[22] the Court noted some of the factors which may be relevant to determining the weight to be attached to an offender's participation in the Koori Court process. There the Court stated:

> In our view, in determining the weight to be attached to an offender's participation in a Koori Court sentencing conversation as a mitigating factor, a sentencing court should consider a range of factors, including:
>
> (1) The fact that participation in the process is a voluntary one, may be confronting to the offender, and will likely involve him or her being 'shamed'. As noted in *Morgan*, participation in the process may of itself be rehabilitative.
>
> (2) The fact that the offender is, rather than 'hiding behind counsel', taking the opportunity to personally:
>
> (a) demonstrate his or her remorse for the offending;
>
> (b) demonstrate insight into the reasons for, and the seriousness and effect of, the offending; and
>
> (c) express any intention to reform and how that will be done, including by participating in available rehabilitation programs.
>
> (3) The Court's assessment of the genuineness of the offender's statements during the sentencing conversation. That assessment should take account of all the information before the Court.[23]

152 In the present case, those factors apply, in fair measure, to the manner in which the respondent had participated in the Sentencing Conversation in the course of the plea hearing. While the participation of an offender, in that process, is by no means a ticket to freedom, nevertheless, as a matter of proper sentencing principle, it is appropriate to take it into account for the reasons explained by this Court in *Morgan* and *Honeysett*.

21 Ibid 237 [34]–[37].

22 (2018) 56 VR 375.

23 Ibid [54].

153 In summary, then, there were a number of strong mitigating circumstances which the judge was required to take into account in determining the appropriate sentences to be imposed on the respondent. Nevertheless, the plain fact remains that the offending in this case was, for the reasons we have outlined, particularly serious. In a case involving offending of this nature, the principles of general deterrence, denunciation and specific deterrence are of particular importance. The sentences imposed by the courts, in respect of the type of conduct indulged in by the respondent and his co-offender, must be such as to demonstrate to like-minded individuals in the community that if they proceed to commit the type of offences that occurred in this case, those individuals will forfeit the right to remain at liberty within the community for a very lengthy period of time. It is only by imposing such sentences that the courts can adequately fulfil their obligation to deter criminal conduct of the kind that took place in this case.

154 Allied to that consideration is the necessity for sentences, in respect of offending of this kind, to adequately express the condemnation by the community of the type of conduct engaged in this case that contravened the basic standards of civilised behaviour in our society. For the reasons we have discussed, the moral culpability of the respondent for the offending was somewhat reduced, and to that extent the principles of general deterrence and denunciation are and were ameliorated. Nevertheless, they remained important considerations in the determination of the appropriate sentence to be imposed on him.

155 The principles of specific deterrence also required appropriate application. The respondent had previously been given the opportunity to take advantage of non-custodial dispositions imposed on him by lower courts. It is clear, from his offending in this case, and the circumstances which attended it, that those dispositions did not, to any measurable degree, address the respondent's predisposition to engage in anti-social conduct. In particular, it is relevant, and a matter of aggravation, that the respondent committed the present offences while serving a community correction order. Certainly, at the time of sentencing, the

respondent had taken steps to 'turn the corner', by undertaking a number of rehabilitative programs while on remand, and by participating meaningfully in the Sentencing Conversation in the plea hearing. Nevertheless, it was necessary that the sentences in this case be sufficiently severe to teach the respondent a lesson that if, on his release from custody, he were minded to engage in the same kind of conduct again, he would receive a stern sentence involving a substantial term of imprisonment.

156 In the present case, it must be acknowledged that the sentencing task confronting the judge was particularly complicated. Our recitation of the aggravating factors, the sentencing principles, and the mitigating circumstances, which all were required to be balanced in the sentencing discretion, demonstrates the complexity of the task that the judge was required to undertake. Nevertheless, as we have said, it is unarguable that the offending in this case was particularly serious. Giving full weight to each of the mitigating factors to which we have referred, we are nevertheless persuaded that the sentences imposed in respect of charges 2 to 5 and 7 and 8, and the orders for cumulation in respect of those offences, were wholly outside the range of sentences available to the sentencing judge. Giving full weight to the principle of totality, we are also persuaded that, for the same reasons, the total effective sentence of 4 years' imprisonment, with a non-parole period of 2 years, is manifestly inadequate. For the reasons discussed, the sentences imposed on the respondent in respect of those charges, and the total effective sentence, were wholly inadequate to reflect and denounce the very serious and wholly unacceptable nature of the conduct that constituted the offending in the case, to act as a general deterrent against that type of offending in our community, and to adequately convey to the respondent the type of penalty that he will suffer if, on his release, he were to lapse into the commission of similar offences again.

157 As noted, counsel for the respondent submitted that if we were to reach that conclusion, we should nevertheless dismiss the appeal, by recourse to the residual discretion. In support of that submission, counsel noted that the respondent had

already served some eighteen months of the sentence imposed on him, and that, accordingly, under the sentence imposed, he would be eligible for parole in approximately six months. Counsel also tendered additional certificates evidencing the participation and completion by the respondent of further courses that he has undertaken since sentencing, and certificates noting that random urine tests undertaken by prison management had all returned negative for drug abuse.

158 The matters relied on by counsel for the respondent are not without substance. Nevertheless, we do not consider that they are sufficient to persuade the Court, in the responsible exercise by it of its residual discretion, to refrain from re-sentencing the respondent to a sentence which would be appropriate, particularly given the serious nature of the offences committed by the respondent.

159 Taking into account the mitigating circumstances to which we have referred, we would re-sentence the respondent as follows.

160 ge	**161 Offence**	**162 Sentence**	**163 Cumulation**
164	165 Theft of motor vehicle *Crimes Act 1958*, s 74(1)	166 6 months	167 Nil
168	169 Armed robbery 170 *Crimes Act 1958*, s 75A(1)	171 3 years 6 months	172 6 months
173	174 Armed robbery 175 *Crimes Act 1958*, s 75A(1)	176 3 years 6 months	177 6 months
178	179 Armed robbery 180 *Crimes Act 1958*, s 75A(1)	181 3 years 6 months	182 6 months
183	184 Armed robbery	186 4 years	187 Bas

	185 *Crimes Act 1958*, s 75A(1)	6 months	e
188	189 Being a prohibited person in possession of an imitation firearm 190 *Control of Weapons Act 1990*, s 5AB(2)	191 9 months	192 Nil
193	194 Obtaining property by deception 195 *Crimes Act 1958*, s 81(1)	196 one month imprisonment	197 14 days
198	199 Obtaining a financial advantage by deception 200 *Crimes Act 1958*, s 82(1)	201 one month imprisonment	202 14 days
203	204 Summary charge: Deal property suspected proceed of crime 205 *Crimes Act 1958*, s 195	206 7 days' imprisonment	207 Nil
208	**Total effective sentence:** 6 years and one month imprisonment		
209	**Non-parole period:** 3 years		
210	**Pre-sentence detention:** 568 days		
211	**6AAA statement:** 8 years and 6 months' imprisonment with a non-parole period of 6 years		
212 213	**Other relevant orders:** — Forfeiture order on charges 1–8 pursuant to *Confiscation Act 1997*, s 32(1)		

214 — Forfeiture order pursuant to *Firearms Act 1966*, s 151 215 — In respect of charge 1, order cancelling and disqualifying the respondent from holding licences/permits for 2 years[24]

216 In re-sentencing the respondent in that way, we make two further observations.

217 First, we were informed that after sentencing in this case, the respondent was sentenced by the Melbourne Magistrates' Court, on 11 December 2018, on charges of dealing with and handling stolen goods, to a term of six months' imprisonment, with three months of that sentence to be served concurrently with the sentence imposed in the present case. At the date of this judgment, and the re-sentencing by this Court, the sentence imposed by the Melbourne Magistrates' Court on 11 December 2018 will have been served, and thus will have expired. Consistent with s 16(1) of the *Sentencing Act 1991*, it is our intention that the whole of the sentence that we impose (by resentence) not be additional to the sentence imposed by the Melbourne Magistrates' Court. That objective will be achieved by declaring the pre-sentence detention, in respect of the sentence, that we impose by re-sentence, be calculated from the date of the original arrest of the respondent on 24 November 2017 on the matters that are the subject of the charges in this case.

218 Secondly, at the risk of repetition, it is important that we make it plain that if it were not for the very substantial mitigating circumstances relating to the respondent's situation in this case, we would have sentenced him to a significantly longer term of imprisonment in respect of each of the four charges of armed robbery, and to a significantly longer total effective sentence and non-parole period. The sentences that we have imposed, by re-sentence, are, we consider, lenient, reflecting the weight of those subjective mitigating factors relevant to the circumstances of the respondent, and reflecting the importance of the principle that a person in the position of the respondent, with his unfortunate background, be accorded the appropriate opportunity to rehabilitate himself.

[24] Order presumed to have been made under *Sentencing Act 1991*, s 89A(1).